

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THOMSON REUTERS ENTERPRISE)
CENTRE GMBH and WEST PUBLISHING)
CORPORATION,)
) C.A. No. 20-613-SB
Plaintiffs/Counterdefendants,)
) JURY TRIAL DEMANDED
v.)
)
ROSS INTELLIGENCE INC.,)
)
Defendant/Counterclaimant.)

**EXHIBIT A TO ROSS INTELLIGENCE'S RESPONSE AND
OBJECTIONS TO PLAINTIFFS' PROPOSED VERDICT FORM**

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Dated: August 16, 2024

EXHIBIT A

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 THOMSON REUTERS ENTERPRISE CENTRE)
4 GmbH et al.,)
5 Plaintiffs,)
6 vs.) Case No.
7 ROSS INTELLIGENCE INC.,) 20-CV-613-SB
8 Defendant.)

9 TRANSCRIPT OF PRETRIAL CONFERENCE

10
11 PRETRIAL CONFERENCE had before the Honorable
12 Stephanos Bibas, U.S.D.C.J., in Courtroom 2B on the 6th of
13 August, 2024.

14

15 APPEARANCES

16 MORRIS, NICHOLS, ARSHT & TUNNELL LLP
17 BY: JEREMY TIGAN, ESQ.

18 -and-

19 KIRKLAND & ELLIS LLP
20 BY: DALE CENDALI, ESQ.
JOSHUA SIMMONS, ESQ.
MIRANDA MEANS, ESQ.
YUNGMOON CHANG, ESQ.
ERIC LOVERRO, ESQ.

22 Counsel for Plaintiffs

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1 (Appearances continued.)

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3 POTTER ANDERSON & CORROON LLP
4 BY: DAVID MOORE, ESQ.

5

-and-

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7 CROWELL & MORING LLP
8 BY: WARRINGTON S. PARKER III, ESQ.
9 KEITH HARRISON, ESQ.
10 JOACHIM STEINBERG, ESQ.

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12 Counsel for Defendant

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1 THE COURT: So we're here in Thomson Reuters
2 Enterprise versus ROSS Intelligence 20613. Counsel for
3 Plaintiffs, please enter your appearances.

4 MR. TIGAN: Good afternoon, Your Honor. Jeremy
5 Tigan with Morris Nichols here in Wilmington for the
6 plaintiffs. I'm joined by five of my colleagues from
7 Kirkland & Ellis today. I have Dale Cendali, Joshua
8 Simmons, Miranda Means, Yungmoon Chang, and Eric Loverro
9 with me, and depending on the issue discussed, you may hear
10 from variation combinations of them.

11 THE COURT: Mr. Tigan, are you going to take the
12 lead on the general admin issues?

13 MR. TIGAN: Yes, I'm happy to discuss that when
14 Your Honor is ready.

15 THE COURT: Very good. Thank you.

16 | And for Defendant.

17 MR. MOORE: Good afternoon, Your Honor. David
18 Moore from Potter Anderson here in Wilmington joined by my
19 colleagues from Crowell & Moring Warrington Parker, Joachim
20 Steinberg, and Keith Harrison.

21 THE COURT: Good afternoon to you all.

24 MR. MOORE: I'm happy to, but I think Mr. Parker
25 planned to handle that.

1 THE COURT: Mr. Parker. Okay. Got it. Great.
2
3 We have trial in three weeks, and my
4 understanding is this case is going to trial or we all
5 expect it to. We're going to -- I want to start by talking
6 about Dr. Braden's replacement. We'll go on to talk about
7 trial logistics, dates, times, things like that. We'll go
8 to substantive issues like jury instructions, voir dire,
9 verdict sheet, and some motions in limine, deposition
10 designations, and then we'll loop back around to the
11 antitrust summary judgment oral argument that comes up after
this copyright trial.

12 Is there anything else apart from the things
13 I've laid out that the parties want to add to the agenda
14 today?

15 MS. CENDALI: Nothing I can think of, Your
16 Honor.

17 MR. PARKER: No.

22 MR. PARKER: Much less. Dr. Braden passed away
23 around midnight July 19th East Coast time. We have obtained
24 an expert. We retained that expert on Wednesday. We
25 offered the name of the expert to Plaintiff's counsel on

1 Tuesday, which we're required to do under the protective
2 order. Plaintiff's counsel responded on Wednesday. His
3 name is Joe Morris.

4 As I indicated to you when we talked on the
5 Thursday before last, I was able to represent to the Court
6 that I anticipated having an expert. That expert, through
7 no fault of our own, received the last materials today, this
8 morning. And talking to him this evening, I will report to
9 the Court and opposing counsel what his views are on getting
10 up to speed. I literally have no idea.

11 THE COURT: We're not in a position to know yet
12 whether he adopts Dr. Braden's report and is comfortable
13 doing so.

14 MR. PARKER: I think he is going to be able to
15 do that. He read the reports. He said, "It makes sense to
16 me," but he hasn't had the underlying material to say more
17 than that.

18 THE COURT: Understood. Does he have
19 availability through the end of the month?

20 MR. PARKER: Yes, he does.

21 THE COURT: Very good. So is there -- if we
22 could proceed to trial on the current schedule, are there
23 any accommodations that your side needs, anticipates needing
24 with him, or do you need to discuss those after you go
25 through the substantive issues?

1 MR. PARKER: Step one for me is let me talk to
2 him tonight. I'm not sure if there's anything that needs to
3 be done. There are some logistics that we probably need to
4 work out, simple things that I don't think we have a problem
5 with. You're not Dr. Braden. You're somebody different and
6 sort of impeach him in that kind of way.

7 Can I just talk to him tonight and I can get a
8 very fulsome report. My hope is that he can say he's going
9 to go to trial. I told him, frankly, please don't make a
10 representation until you have all the materials.

11 And let me just -- I want to be clear for
12 everyone. The last materials he received this morning were
13 the source code. He was supposed to receive that yesterday
14 and it was Federal Express and I don't know. It was in
15 the Federal Express world until this morning.

16 THE COURT: Got it. Understood. Let's see if
17 we're able to come together by a call or Zoom at the end of
18 the week. Great. I have a trial next week, but I will make
19 time around it to talk to you, given the late-breaking
20 nature of this.

21 I also think it would be entirely appropriate if
22 the parties are able to agree now on the language of some
23 instruction I give them explaining it's no fault of ROSS's
24 that this -- the previous expert died and that this is
25 unusual procedure and that, obviously, we'll have some

1 questions about what he knows, et cetera, hasn't done this
2 personally. So we'll be doing that, but there's no reason
3 that any suspicion should fall on ROSS by the nature of it.
4 And there will be, of necessity, some of what he's able to
5 say about the report based on his review of the materials,
6 et cetera, but he didn't write it himself.

7 MR. PARKER: So what we'll -- let me just give
8 you the Court my ideas for tomorrow. Tomorrow, I'm flying
9 from 8:00 this time until 1:00 California time. It's not
10 going to be a problem. If he says he's ready, I'm going to
11 ask Mr. Moore to send you a letter and opposing counsel
12 saying he can do this by that date. If not, I'm going to
13 say -- have another letter saying no, but I would submit an
14 affidavit on his behalf. I know from the judge's -- from
15 your earlier position on this there may be some headwinds on
16 this, but we'll at least give you, the Court, one way or the
17 other a heads-up. I don't know which way it will turn, but
18 we'll get it done.

19 THE COURT: I appreciate your being a good
20 officer of the court and not representing more than you can
21 represent at this point. And under the circumstances, that
22 seems eminently reasonable to me. We'll hear from Thomson
23 Reuters, but it doesn't seem like we can expect more of a
24 position until he's had an appropriate time to go through
25 it.

1 So you do your flight tomorrow, spend some time
2 talking with him, and then work with opposing counsel to see
3 if we're in a position to set up a call later in the week,
4 just a status on this.

5 MR. PARKER: Certainly. Thank you.

6 THE COURT: Very good. So let's -- is there any
7 more that anyone would like to say on that?

8 MS. CENDALI: No, Your Honor. This is
9 Ms. Cendali. Other than to say we're happy to work with
10 them on the type of stipulation you envisioned, and for all
11 the reasons we talked about last time, we're hopeful, as I
12 think everyone in the room is, that we can go to trial.

13 THE COURT: Very good. I'm taking you at face
14 value. We're not going to allow anything that would
15 inadvertently insinuate that there's something improper
16 going on here. I wouldn't expect it from you. I'm sure we
17 can agree on mutually agreeable language to sue for the
18 jury.

19 MS. CENDALI: Unless there's something else
20 going on, which I don't think Mr. Parker is a murderer, I'm
21 confident that this had nothing to do with ROSS and they
22 will not be in any way criticized for that.

23 THE COURT: I'll take him as representing that
24 he, in fact, had nothing to do with the untimely demise.

25 MR. PARKER: I'm not going to respond to that.

1 And I've done this for the last three days and
2 I've used every other name for Joe except the right one.
3 His last name is Marks and not Morris, not Martin, and all
4 the other last names I've made for him.

5 THE COURT: So it's Marks.

6 MR. PARKER: Marks, M-A-R-K-S.

7 THE COURT: And just kind of curious. What's
8 his professional background and training?

9 MR. PARKER: AI programmer, Carnegie Mellon.

10 THE COURT: Was he on faculty there?

11 MR. PARKER: He is.

12 THE COURT: Very good.

13 Are we ready to move on?

14 Okay. Let's talk about logistics. The first
15 thing, I think I had this down for jury selection at
16 10:00 a.m. August 26th. I'm a little concerned that with
17 the last-minute search, I want to leave us a little bit more
18 room. Each side has 15 hours plus an hour for opening, and
19 about an hour and a half for closing, I think it is.

20 Would the parties be amenable to our going from
21 jury selection directly into opening statements and using
22 Friday as a full trial day? Gives us a little more elbow
23 room, and I don't want the jury to feel rushed in its
24 deliberations to try to get out of there for the Labor Day
25 weekend.

1 || Would that work for the parties?

2 MR. PARKER: As long as we don't split openings,
3 I don't mind. In other words, if we could do openings all
4 on the Friday.

5 THE COURT: I agree. You don't want to leave
6 the jury over the weekend having heard from only one side.
7 I think I can pick a jury before lunch. If the opening is
8 right after lunch, we can get into a first witness.

9 MR. PARKER: I'm fine.

10 MS. CENDALI: As long as, Your Honor, we can
11 just do the opening and not actually start testimony. I
12 think that would be hard given what we know about witness
13 availability.

14 THE COURT: So you think what we should do is do
15 the openings on Friday and not get to the first witness
16 until Monday morning.

17 MS. CENDALI: That's my suggestion, Your Honor.

18 MR. PARKER: I would really ask the Court not to
19 start witnesses on Friday because we have arranged flights
20 and all of that for ours.

21 THE COURT: Let's do that. Let's do the
22 openings on Friday. Afterwards, we dismiss the jury and
23 then any more admin things you see that come have up, we can
24 wrap them up on Friday afternoon so we're ready to hit the
25 ground running on Monday morning. The more that we can do,

1 the better.

2 Trial day, I'll check with the jury pool. I
3 want to be a little flexible. My hope is that they can get
4 here before 9:00 and then we're ready to go no later than
5 9:00, which means at 8:30 I handle with you any legal issues
6 that have come up.

7 We do one mid morning break, 10, 15 minutes. We
8 take up lunch about 45 minutes, sometimes around 12:30, but
9 being a little flexible so that we finish up a witness, for
10 example, rather than breaking in the middle of a witness.

11 Ditto for the afternoon. We take one mid
12 afternoon break, 10, 15 minutes. We try to wrap around 4:30
13 but, again, it makes more sense to go an extra ten minutes
14 to let a witness finish up rather than spilling over to the
15 next day.

16 And at the end of the day, out of the jury's
17 hearing, it's much more efficient, rather than doing
18 sidebars, to do the issues you anticipate with the witness
19 or scope of the cross, et cetera, when we've broken for
20 lunch or broken for midmorning or afternoon break or broken
21 for the day.

22 I wanted to work through logistics for how this
23 will work. First of all, AV. I'm having the deputy run
24 down what courtroom we're going to be in. Why doesn't each
25 side give me an understanding of what AV you need or want,

1 what you plant to do in terms of bringing in a vendor to set
2 up in the courtroom. I'll see what we can do in terms of
3 make the courtroom available for your vendors to set up and
4 test stuff out ahead of time. This sounds to me like the
5 kind of trial where there will be some -- present some
6 complicated information to the jury in a visual format.

7 So why don't we hear from Thomson Reuters about
8 how you'd like to do it.

9 MR. SIMMONS: So, Your Honor, we're happy to
10 have our trial techs discuss with the courtroom deputy
11 trials in Delaware. We've done this multiple times where
12 we'll have monitors for the jury to be able to view
13 demonstratives. There is a setup in the courtroom,
14 obviously, and our trial techs can hook into the system and
15 project.

16 THE COURT: There will be a screen set up that
17 the jurors can see, there will be a screen that I can see,
18 there will be a screen that the witness can see.

19 MR. SIMMONS: Correct. All we'll need to do is
20 work with the trial tech team here the and hook into the
21 system. Other than that, we don't have a lot of extra
22 needs. Sometimes the court reporter will provide realtime,
23 which is useful. One thing I don't know is how you do
24 sidebars, especially if you're doing sidebar up at the desk
25 so it's helpful for others to see it. If you can set up a

1 time for them to come in, they have done many trials and are
2 happy to work with you.

3 THE COURT: By tomorrow, we will have a
4 courtroom assigned. At that point, court staff will be able
5 to tell you what's already wired there. We'll see if we can
6 block out -- if we're starting -- does the tech need to be
7 set up for the openings?

8 MR. SIMMONS: Yes.

9 THE COURT: Then let's try to block out the
10 courtroom Thursday the 22nd so that the vendors can come in,
11 set it up, do some testing, et cetera. We'll do the jury
12 selection 23rd in the morning. We'll do the openings in the
13 afternoon. We'll break before there are any witnesses and
14 then we'll -- it will all be set up before the trial even
15 starts. Okay.

16 Now, I don't know whether you're going to be
17 using the same tech system that ROSS, I think, is using.
18 Have you two worked together on this?

19 MR. SIMMONS: We haven't had that conversation
20 yet. My experience has been that each side would have their
21 own tech set up that gets filtered in the Delaware court
22 system and a switch gets switched.

23 THE COURT: In terms of screens and things.

24 MR. SIMMONS: We can coordinate.

25 THE COURT: We're not going to use duplicates.

1 And in terms of whether you anticipate there
2 will also be hard copy binders, the kind of logistics of
3 providing exhibits to each of us as well the jurors. This
4 is not a place -- I don't know whether the other courts here
5 do, but I don't think they do have those flip-up viewing
6 screens for each juror. If you anticipate having some hard
7 copy exhibits, obviously, we'll have some system that works,
8 whether it's a separate binder for each side or a
9 consolidated binder.

10 MR. SIMMONS: We can certainly do that. In my
11 experience, we usually provide to the witness and to the
12 Court and opposing counsel when the witness goes up on
13 direct and then when the cross starts and the binder goes
14 out to everybody. Is that Your Honor's preference?

15 THE COURT: That's fine. Very good. Let me
16 hear from ROSS.

17 MR. PARKER: I do have just one question. I've
18 done it this way for long enough. I want to make sure we're
19 clear. I have not usually handed up hard copies to the
20 jurors, the 11 or 12. Usually, we would show it on the
21 video and they would see it and highlight what we wish.

22 THE COURT: That's fine. It avoids a lot of
23 papers moving around. At some point, I'll want them to have
24 a binder once all the stuff has been admitted and stuff.
25 During the direct, it gets clunky.

1 MR. PARKER: They will definitely have a binder,
2 and we will work together to make sure that they have a
3 coherent binder. I appreciate that.

4 THE COURT: Okay. Great.

5 Let's see. Is the courthouse set up in terms of
6 rooms for each side's counsel and leaving equipment? What
7 can you tell me about that?

8 Each side can have an attorney lounge and we can
9 lock the doors for them. They can leave the AV. They can
10 leave the electronics and binders and other stuff like that.
11 They don't need to, like, move them aside or anything else.

12 MR. TIGAN: She beat me to the punch, but I
13 think we've made a reservation, I assume Mr. Moore's firm as
14 well. The breakout rooms are locked at 4:00, 4:30,
15 something like that, so we can take care of that.

16 THE COURT: I think this courthouse might have a
17 prohibition on personal electronic devices. If the sides
18 want a written order from the Court giving the attorneys
19 permission -- now, you're on your honor to turn off the
20 noise and silence them. I will not be pleased if I hear
21 ringing. Set everything on vibrate.

22 But on that understanding, if you want to
23 prepare some orders, I can have my staff put the signature
24 on it so ordered. You can present it when you come to the
25 Court, and you'll be allowed to have things. Let's do it

1 ahead of trial. It's not something I need to be signing the
2 morning of trial.

3 MR. SIMMONS: Yes, Your Honor. We'll have that
4 prepared.

5 THE COURT: Very good. Are the counsel for each
6 side planning to provide lunch for the jurors, or should I
7 be telling them to bring their own lunches?

8 MR. TIGAN: Maybe I should stay up here.

9 Yes, typically Delaware counsel coordinate that.
10 We split the cost and we get a menu in to the jurors. And
11 there's no indication who's paying for it or where it comes
12 from. We just provide that.

13 THE COURT: Absolutely. It just makes things
14 faster. No one is running back from some greasy spoon
15 worried about starting. It saves a lot of time. That's
16 great. Much obliged.

17 In terms of courtroom, we don't need to move
18 things aside. We'll have to know which courtroom we're in
19 before we figure out witness and location, but since we're
20 going to have some extra time on Friday the 23rd, I think
21 after we dismiss the jurors for the day then we can work out
22 the, okay, where's the lectern going to be and where are
23 people questioning from. We'll have a better sense of that
24 once we know what courtroom we're in. So I don't think we
25 can really do much about that now.

1 MR. TIGAN: I think the lecterns can be moved
2 slightly. There might be wires under here and the witness
3 box in each courtroom. There's not much that can be done,
4 but we'll look at that.

5 THE COURT: Again, Friday 23rd, a little time to
6 check the mics, the angles, those kinds of things.

7 As I said, the fewer sidebars the better. I
8 tend to be pretty reluctant to do sidebars and I think they
9 just complicate and slow things down.

10 How I do jury selection. I do it in open court.
11 I give each juror -- we can create a map of the seats in the
12 room, and so we're going to do probably 12 jurors plus two
13 alternates. Now that we're past the worst of COVID, if it
14 really is going to be a five-day trial, I'll do two
15 alternates. If people think this might go longer, I can be
16 convinced easily to have a third alternate.

17 But I find it moves so much faster if I ask
18 questions. I ask in open court anyone who has a yes answer
19 to raise the number card. I've got a seat map and you've
20 got a seat map and I go to each of them in turn. Juror
21 Number 2, why did you answer yes to the question? Juror
22 Number 4, why did you answer yes to that question? They
23 stand up and tell they answer, then they sit down. We're
24 jotting down notes as we go going through the whole group.

25 I am not going to ask nearly all the voir dire

1 questions you proposed. I'm going to narrow it down to ones
2 that go to bias if. People have worked in the legal field
3 as a lawyer, paralegal, legal secretary, I'm going to ask
4 about that. If they use -- have some kind of work in AI,
5 I'm going to ask about those kinds of things. But you all
6 have a lot of questions on your list that go substantially
7 beyond that. I'm focusing on does someone have personal
8 involvement in these industries themselves relative or close
9 friend, basically.

10 We're going to jot down answers to all of these
11 questions, and I'll tell them if the answer to something is
12 very sensitive, I'm open to doing it at sidebar, but rarely
13 if ever. This is not a criminal case where there's a lot of
14 sensitive stuff coming up.

15 After that point, each side will exercise its
16 peremptories going back, forth, back, forth, back, forth.
17 We'll do that quietly. No one will know who's been struck
18 and whether they've struck been struck peremptorily or for
19 cause.

20 First, we'll do the for cause, and you'll come
21 up to me after we question the whole pool. You'll go over
22 with me, Your Honor, I move to strike that person for cause
23 or that person. I'll say, yeah, this person has a horrible
24 work conflict or something else. I'm going to resist the
25 usual excuses that people would rather be down Rehoboth

1 Beach right now then be in a courtroom. Once I've done that
2 and teased apart the people for whom it's a genuine hardship
3 or I'm real concerned that they're not going to be able to
4 listen and pay attention and judge patiently, you make your
5 motion for cause, we'll make a record. At that point, we'll
6 go back and forth on peremptories.

20 MR. TIGAN: Your Honor, do you have the
21 alternates join the deliberations?

22 THE COURT: No, the rules -- I know the criminal
23 rules forbid their joining the deliberations. I've got to
24 check as to whether it's permissible in the civil, but I
25 haven't done that in the past. I'm open to considering it.

1 MR. TIGAN: I don't think we have any view.

2 Mr. Moore can correct me. I think they typically do in a
3 Delaware civil jury where there's six to eight, but
4 obviously completely up to the Court.

8 MR. TIGAN: And three peremptories per side, is
9 that what Your Honor --

10 THE COURT: The standard in Delaware court and
11 civil rules, three per side. We have that. As I said, I
12 exercise a kind of prudent middle ground in terms of what I
13 do on for cause and after that, you know. If Plaintiffs
14 have exercised three strikes -- if we've done the for cause,
15 Plaintiff used three strikes, the defendant in deciding to
16 use the last strike if I strike this person then the next
17 person numerically after that is going to be the one that
18 winds up on the jury.

19 So you can figure out 12 plus 6 is 18. 14 plus
20 6 is 20. Once we've done for cause, then it's only the
21 lowest 20 numbered people that we're looking at as
22 potentially being on the jury if we wind up having to do
23 follow-up question, but usually it's the basic questions.

24 We'll work out -- those are good last questions
25 we'll work that out by the final time. But I think the

1 three plus three considering whether or not we're in
2 deliberations, we'll get that rule before the trial.

3 MS. CENDALI: Your Honor, I just have a
4 question. Is it possible to have a break after the for
5 cause before the people start exercising their peremptories
6 just to think about it with their team?

7 THE COURT: I'll give you five minutes or so to
8 huddle. When I send them off for a break, it winds up being
9 25 minutes. You guys will have time to huddle. I won't
10 tell them what exactly is going on, but you'll have a chance
11 to confer about these I see these 20 and here's the 20 I'm
12 concerned about.

13 Exhibits. So let's talk a little bit. How much
14 can we get stipulated about -- I presume we'll have all the
15 exhibits premarked. How much do we have to do in terms of
16 identifying and authenticating and foundation, and how much
17 are we going to be able to resolve by pretrial stipulations?
18 Because it's wasting everyone's time if we're dealing with
19 objections in open court where there isn't a serious
20 authenticity or foundation issue. Tell me what and how you
21 propose to work these out ahead of time.

22 MS. CHANG: Good morning, Your Honor. Yungmoon
23 Chang on plaintiff of Plaintiffs.

24 We've been working with the other side, and the
25 exhibit list that we filed represents the full universe of

1 exhibits that may be used with the full universe of
2 objections that existed at the time those exhibit lists were
3 filed. As Your Honor can imagine, since then, the
4 objections will narrow pursuant to the pretrial order, which
5 has the provision that says documents that have been
6 produced are presumed to be authentic on their face. Also,
7 the documents will come in through a sponsoring witness.
8 There may have been foundation exhibits that were preserved
9 because we didn't know how, the parties didn't know how, the
10 exhibits would be coming in.

11 THE COURT: That's the kind of thing pretrial.
12 Rule 403 type stuff, I get. You wind up raising it on the
13 fly. Sometimes it's how the stuff has come in. But the
14 authentication, the foundation stuff, the hearsay, and
15 whether it's a business record, most of this stuff you can
16 see coming down the pike.

17 MS. CHANG: Certainly, we're in agreement with
18 Your Honor. And we'll note that the pretrial order that was
19 entered by this Court, the parties agreed that certain types
20 of exhibits would be joint exhibits to which there will be
21 no objection. Those are things like the case notes and head
22 notes. I think there's no objection there.

23 What we would propose is we had a conversation
24 with opposing counsel earlier today in an effort to
25 streamline the disputes for the Court. Rather than go

1 through the exhibit list in their current condition, what we
2 would propose is following today, following the rulings on
3 the motions in limine, that the sides would work together to
4 identify early objections that are higher priority and more
5 likely to arise and then to raise those to the Court's
6 attention at the Court's convenience. That would be our
7 proposal.

8 THE COURT: That makes perfect sense. And
9 related to that, obviously, getting into with whole
10 filtration issue, we have 1,800 pages of head notes.
11 Everyone understands that it's lunacy to think you can put
12 even a fifth of those to the jury, and I want some proposals
13 in terms of either whether you're going to focus on certain
14 bellwethers or whether there will be clumping classes of
15 things together because the experts are testifying about
16 relevance as a whole, you're going to have to push them on
17 cross. How can you say this about the evidence as a whole?
18 What is the value added? Was the value added simply that
19 these were organized or was there more some kind of
20 creativity that went into the system. But over the next
21 couple of weeks, we're going to have to come to some
22 concrete proposals about which head notes are clustered and
23 head notes and how they're going to be presented. There's
24 no way to do a one-week trial with hundreds of pages of head
25 notes.

1 MS. CHANG: Understood, Your Honor. We'll do
2 that.

3 MR. PARKER: So I'm going to say something and I
4 don't mean to excite the Court when I say this. I would be
5 loath to stipulate that exhibits should just be admitted
6 because I think there should be a sponsoring witness. I
7 would only make a foundation objection if, for example, they
8 show a witness an e-mail, that person's name is not on it,
9 that person says I've never seen it before. Then I think it
10 would be ripe.

11 We are not going to fight -- like, if it's a
12 business record, I'm not going to. My God, you should yell
13 at me if I do that. But I would like to have a sponsoring
14 witness so that lawyers are -- we're constrained into
15 arguing what the document or thing actually is by the
16 witness's testimony. That's the only thing I would ask, if
17 the Court would indulge me on that. If I cross the line,
18 take it out on me.

19 THE COURT: I got it. Very reasonable. Strong
20 presumption this stuff is going to come in, but if there's
21 just no witness at all, it's difficult.

22 MR. PARKER: Thank you.

23 THE COURT: Let's see. Let's talk about some of
24 logistics. I think I talked to you about voir dire. I
25 think I'm going to try to get you a streamlined voir dire

1 draft ahead of time. I actually -- if you have a real
2 objection I'm interested in listening. My understanding is
3 I have very broad latitude what to cover or not, and I
4 intend to cover things that go genuinely to bias.

5 In terms of jury instructions, I'm going to be
6 working over the next couple of weeks to work out the
7 difference in copyright laws and compile jury instructions.
8 My experience, is first of all, juries are commonly baffled
9 by jury instructions. They're just written in legalese. I
10 take the substance of the standard instructions and then I
11 try to put them in plain English. I also, in a short trial
12 that's a week or less, my strong preference is if I've given
13 preliminary jury instructions that say don't use a cell
14 phone to do research, I don't repeat that instruction
15 verbatim a week later when they retire. If I tell them
16 don't talk to anyone outside, I can simply remind them I
17 said that a week ago. This is not a two-month trial, so I'm
18 going to do a lot of that and just trying to put stuff in
19 plain English. That helps.

20 And the other thing I'll do as far as the
21 instructions is if I can format it and indent it and say
22 there are four elements of this claim or three elements of
23 this defense, I will do indenting and bullet points and
24 things like that.

25 Obviously, this is a pretty novel area of law.

1 There are some genuine disputes about what copyright means,
2 how fair use works, how we can do damages. That stuff I'm
3 going to spend the next couple of weeks on in light of your
4 proposed jury instructions. I will, of course, have drafts
5 of preliminary jury instructions I'll have to you before
6 trial, but the final jury instructions, we have to see how
7 some of this stuff comes in, but I will have done
8 substantial work on getting to the final set, and we'll have
9 a charging conference before this goes back to the jury.

10 To the extent I can resolve some of these issues
11 at the beginning of trial, I'm talking about the Friday,
12 August 23rd, I will let you know what I can because I
13 understand it will affect how you develop your case.

14 In terms of verdict sheets --

15 Sorry. You wanted to add something.

16 MR. SIMMONS: Your Honor, in terms of the
17 formatting, would it be helpful if we provide the Court with
18 Word versions of the submissions.

19 THE COURT: It would be.

20 MR. SIMMONS: Second of all, in terms of the
21 charge conference with the final jury instructions, what
22 timing do you anticipate? Many judges do it Thursday
23 afternoon if we're closing on Friday. And also when will
24 you be giving the final, before or after the closings?

25 THE COURT: I defer -- different courthouses

1 have different practice on this. If the parties both prefer
2 to close before the charge or close after the charge, I'll
3 do what the parties have a joint preference on. It seems
4 local courthouse culture varies a lot on this. I don't
5 really care.

6 I will certainly do a charging conference in
7 time for you to prepare the closing. It's hard to prepare a
8 closing without the charging conference. And usually, if I
9 can do it the night before, great. If not, at least it
10 would be before a lunch break or something like that. We
11 have to see how long it runs.

12 Look, I've tried cases. I know you need to know
13 these things as you prepare your closing. If we're just
14 about ready to close Friday morning, then we'll stay late
15 and do the charging conference Thursday night so that you
16 have that evening to write your closings.

17 MR. SIMMONS: Thank you, Your Honor. That's
18 helpful. From the plaintiff's perspective, I think having
19 the charge for the jury before the closing makes it easier
20 for the jury to understand so they have the framework for
21 the evidence.

22 THE COURT: "The judge just told you" rather
23 than "the judge is about to tell you."

24 MR. SIMMONS: Which is awkward. They don't
25 really understand the sequence.

1 THE COURT: Is ROSS amenable to doing that,
2 having the jury charge and then doing closings?

3 MR. PARKER: I think so. Let me think about it.

10 In terms of verdict sheet, both of you have
11 special verdict forms. This is clearly the kind of case
12 that calls for a special verdict form. ROSS's is a longer.
13 I tend to like ROSS's approach with the caveat that ROSS's
14 then asks the jurors to turn to some appendix of a whole
15 bunch of head notes that were not turned over or at least
16 not submitted to me as one of the exhibits attached to this,
17 at least as I got it. And again, it can't be 1,800 pages or
18 whatever. I like the concept. I want to understand what
19 the execution is actually going to look like.

20 MR. PARKER: We need to talk about the exhibit
21 that we would attached is 21,000-some-odd head notes, so we
22 thought we don't quite know what you to do with this, and
23 it's Plaintiff's case, and I think the exhibits are going to
24 depend on how this Court wants certain things bundled up. I
25 think they need to see the copyright at issue. That's why

1 we did it.

2 THE COURT: The idea of focusing in on each
3 possible element of defense, whether there's certain things
4 copyrighted or not, a lot of intuitive sense in guiding the
5 jury step by step. It's figuring out the mechanics how we
6 group and cluster head notes so they can consider them as
7 batches.

8 MR. SIMMONS: Your Honor, if I may.

9 THE COURT: Yes.

10 MR. SIMMONS: I'm happy to reserve argument on
11 the verdict form because, as you can imagine, we don't agree
12 with the approach. If you want to hear argument on it now,
13 I'm happy to walk through it.

14 THE COURT: Sure.

15 MR. SIMMONS: One of the major issues here is it
16 doesn't actually follow the way that the Copyright Act and
17 copyright law works in terms of they talk about the validity
18 of the head note, the validity of a copyrighted head note.
19 That's not the proper test. The question is, is there
20 validity of the work, which is Westlaw.

21 The way our verdict form works, it starts with
22 that presumption, which is the copyrighted work is Westlaw
23 and then there's infringement of the head notes as the
24 subsidiary question. There's a concern I have going through
25 this, and I don't think we have time to do it. We have

1 internal consistency where you're going through and it's
2 unclear what the jury is supposed to do at each turn in the
3 road. We're happy to work from this form and propose
4 something to the Court.

5 THE COURT: I think that would be helpful to try
6 to come up with something that is more detailed along ROSS's
7 lines but that makes clear, at this point, our position
8 based on this authority, we should be judging the copyright
9 on the work as a whole. The response is going to be you're
10 supposed to be filtering these kinds of things out, but
11 you're saying that happens at a the infringement stage. Got
12 it.

13 So if you can come back to me with a revised
14 proposal, my concern is just step by step. There's a way to
15 do that consistent with okay your argument is the correct
16 sequence of steps is this. So take another crack at that.

17 MR. SIMMONS: Can do.

18 MR. PARKER: I'll just preview this because I
19 think this will be a fight. There's no question that when
20 something is registered in a compilation those things that
21 are copyrightable inside of that remain copyrighted. As an
22 example, if I play something that was in the public domain
23 in a compilation, it doesn't become copyrightable. And then
24 otherwise, then, the question posed is did a value copyright
25 take it to compilation, for example. The facts within a

1 compilation can never be copyrighted.

2 THE COURT: It cannot be. The question is if
3 there's a certain system of organization that makes the
4 individual facts more usable, better searchable, where you
5 see connections or you synthesize them, it can become a part
6 of the copyright work.

7 MR. PARKER: I agree. Let's just be very clear.
8 That's a structure sequence, an organization argument. I'm
9 going to agree with you a hundred percent.

10 We have something that's a little bit different,
11 and this goes to the filtration. They have a summary
12 judgment motion that accuses us of violating the words of a
13 head note, of using those words within the head note, and
14 that's not a structure, sequence, and organization argument.
15 Of course, they also argue that the head note sits within a
16 structured sequence of organization, but if we focus just on
17 the words of the head note, that's a different question.
18 That we know it's at issue is they filed a summary judgment
19 on it. There's a summary judgment order recognized that's
20 what they were doing.

21 THE COURT: This is one of those unsettled
22 issues because your defense is the way you're using
23 something to crawl over it in AI is not -- maybe they would
24 disagree with this, but arguably might not be extracting a
25 creative art but just underlying, unprotected facts. I'm

1 not saying -- I'm saying I understand Defendant's position
2 in taking that argument.

3 MR. PARKER: I'm not asking you to accept it
4 now. I'm going to hope that you accept it, but that's where
5 just talking about structure, sequence, and organization is
6 not enough because I agree to have that claim -- we have
7 jury instructions about it, but I also agree they're looking
8 at the head note saying this question is, they want to say,
9 substantially similar. I think it's virtual identity.

10 THE COURT: Are experts on both sides going to
11 get into what, at a higher level understanding, software is
12 doing when it crawls over and digests all of this raw
13 material and then learns from it? Because it seems like
14 there's huge unsettled issues of law that I'm going to have
15 to decide here about at what point the copyright kicks in
16 and what point the AI is doing something separate.

17 MR. PARKER: I believe from our side, Gino
18 Lobiaccolle [phonetic] is a lay witness who programmed the
19 IA. We'll talk about that as a layperson who did it and
20 then my friend Joe Marks whose name I've gotten correct is
21 the expert who will hopefully do that as well.

22 THE COURT: Anyone from Thomson Reuters want to
23 speak to this?

24 MS. CENDALI: Let me talk a little bit about the
25 relation between the head notes and structure, sequence, and

1 organization. We moved for summary judgment just on those
2 head notes because, as Your Honor knows, those are the ones
3 we are saying their own expert admitted were copied and were
4 the same.

5 We're past summary judgment now, so where are
6 we? Your Honor mentioned *Feist*. *Feist* is key to this case
7 because in addition to saying, "The compilation author
8 typically chooses which facts to include and what order to
9 place them and how to arrange the collated data so that they
10 may be used effectively by readers, these choices as to
11 selection and arrangement, as long as they're made
12 independently by the compiler involving minimal degree of
13 creativity, are copyrightable."

14 And the Court goes on to say, "Even a directory
15 that contains absolutely no protectable written
16 expression" -- which is not the case here -- "only facts
17 meets the constitutional minimum for copyright protection if
18 it features an original selection and arrangement."

19 What I'm concerned about is that there's become
20 confusion as to the significance of the head notes and how
21 similar they are or not to the --

22 THE COURT: That has a lot of power to the
23 copyright laws. And we think there's a formative use or
24 theory. You're right. At different stages, we need to
25 focus on different things and this is at the first stage.

1 MS. CENDALI: That's right, but, Your Honor, a
2 key thing, if I may, is that it's not just that they copied
3 the head notes. Remember, they had the cases. They already
4 had the cases. Our position is they copied the head notes
5 in order to get the pairs with the case text that they go
6 to. They copied the selection of the head note and the
7 arrangement of that head note to the text to the case
8 because that's what they needed to train the AI. They
9 needed and copied the selection of the head note, its
10 arrangement with the case. That was copied. This isn't a
11 case about matching language. We tried to explain that in
12 our response to their submission, but it's a fundamental
13 thing that goes to the heart of the copyright issues, and I
14 wanted to respond.

15 MR. PARKER: I will say this then. Dr. Krine
16 has no business testifying at all. All he does is tell us
17 questions and head notes match each other, the words of the
18 head note. This is a structure, sequence, and organization
19 case, then you can throw out the head notes and words and
20 all the questions. This is purely structure, sequence, and
21 organization. We'll try that case.

22 But we can't have it both ways saying the words
23 of the head notes are creative; therefore, if you make a
24 question out of the head note, that's a copyright violation.
25 There's 21,000 of these things and there are questions next

1 to each one and they had an expert who testified they were
2 like each other. They brought a summary judgment motion on
3 the words saying the words of the head note are creative.
4 Your order said -- recognized that was the argument made.
5 Their interrogatory responses -- I think it's Docket 281 at
6 page 3 says it's the words of the head notes that we
7 infringed as well as other things.

8 So if this is the place they want to be, then
9 the words of the head notes don't make a difference. But
10 what I think they're doing is actually hiding and saying
11 both things. They're saying the words of the head note
12 matter because we picked up words from the text of the
13 opinion. That's an idea, that we want to pick up the words
14 from an opinion that lawyers will care about. It's actually
15 the expression contained in the head note that is relevant
16 for copyright. Otherwise, they're turning the structure,
17 sequence, and organization argument into an idea argument
18 and, therefore, getting copyright protection for it. That's
19 what I'm concerned about.

20 Again, the idea is we have a bunch of people
21 picking the best words out of the case. That's an idea. I
22 could say that's what I want to do as well. It's how you
23 execute. It's the particularized expression of that that is
24 at issue here, if it is any longer at issue.

25 THE COURT: Ms. Cendali.

1 MS. CENDALI: Thank you, Your Honor.

2 Just to be clear, our compilation copyright,
3 which has been frequently issued and issued by the Copyright
4 Office, is rich and deep. By that, it means we are
5 absolutely saying that we wrote synopses, we wrote the west
6 key system, we classified the cases with the head notes, and
7 we wrote our own head notes. Some of them, as we all know,
8 are closer to some of language of the judicial opinions.
9 Some of them aren't closer, but we have a copyright in all
10 of that expression, how it's used together in selection and
11 arrangement and individually.

12 Again, the confusion stems from -- maybe it's
13 our fault in moving for summary judgment on what we thought
14 was low-hanging fruit because they had admitted a lot of the
15 head notes were the same, so we said, all right, let's get
16 those out of the case. But that is nothing to say, as we
17 pled in this case, that they copied our -- the copyrightable
18 and copyrighted content, which includes the language of the
19 head notes, the synopses, the way it relates to the key
20 number system, the classification, and the language itself.
21 And all of that will be presented to the jury.

22 THE COURT: Very good. Let's move on.

23 One last admin request, if I could make a
24 request for each side. If you could have the paralegals
25 pull together the head shot for each of you and have your

1 name and law firm next to it. I like to learn who you all
2 the people are and keep Plaintiff's counsel and Defendant's
3 counsel separate at the top of the sheet. Here's Plaintiff
4 for Thomson Reuters and different counsel list for
5 Defendants. You can get that to me by the first day of
6 trial.

7 MS. CENDALI: Happy to do that.

8 THE COURT: Great.

9 Let's move on to the motions in limine. We have
10 three motions from each side. Are the parties willing to
11 stipulate on any of these items?

12 MS. CENDALI: I'm sorry, Your Honor. I couldn't
13 hear.

14 THE COURT: I think Thomson Reuters made three
15 motions in limine and ROSS made three motions in limine. Is
16 either side willing to drop or stipulate to any of the
17 issues before we go on to arguing?

18 MS. CENDALI: No, Your Honor, other than the
19 fact that one of our motions in limine, the BFC surrebuttal
20 one, was effectively disposed of by Your Honor's Daubert
21 ruling with regard to Dr. Frederickson -- I'm bad at names
22 too -- and issues with regard to that will be addressed in
23 one of ROSS's motions in limine.

24 MR. SIMMONS: It's Barbara Frederickson-Cross.

25 There was a Daubert of Dr. Frederickson-Cross that had been

1 pending. It was addressed in the Dr. Krine motion in
2 limine. We had tied them together.

3 THE COURT: That's already done with respect to
4 her?

5 MR. SIMMONS: Right.

6 There is -- I do have one -- I don't know if
7 there will be a stipulation on the generative AI motion in
8 limine that we brought. It seems like the parties are in
9 agreement that no one plans to talk about generative AI
10 because ROSS didn't create that, and everyone seems to agree
11 ROSS can talk about the benefits and talk about the
12 implications of the technology they created. I think that's
13 agreed. I don't know if there's a stipulation.

14 THE COURT: I read it the same way, which is I
15 can deny the motion on the understanding that ROSS is only
16 going to be talking about things that it can clearly connect
17 and compare with any other examples it uses. If you're
18 going to talk about AI technology that's more advanced than
19 what you use, you've got to say it's more advanced, say why
20 it's related, and not just general benefits or other stuff
21 that doesn't relate to what you're doing. I don't see
22 daylight between the sides.

23 MR. STEINBERG: We agree with that. I think
24 that's our position. Our problem was lack of a definition,
25 but with the understanding, I'm --

1 THE COURT: I'm happy to deny on that
2 understanding and I'll hold you to no rank speculation about
3 how good other AI is. It's got to be tied to your product
4 as we talk about benefits because benefits do get connected
5 up.

6 Let's see. I think Thomson Reuters also had a
7 motion to exclude references to antitrust. I think, again,
8 I don't think there's much daylight here. As I understand
9 it, all ROSS is going to try to do is introduce some
10 evidence that might also come into the trial only on the
11 issues of fair use or damages but not for antitrust per se.

12 MS. CENDALI: May I speak to that, Your Honor?

13 THE COURT: Yes.

14 MS. CENDALI: So the thrust of our motion is
15 that we don't want to bring the antitrust case into this
16 case. And what we've seen recently is that, first, as you
17 saw in our reply brief, Mr. Ruda is tweeting frequently
18 about issues regarding owning the law and antitrust issues.
19 I don't even know if that's testimony. That should not be
20 something that anyone for other reasons should be able to
21 talk about, anyway. But whatever his mandate is on that, it
22 doesn't belong in this case. I don't know if it belongs in
23 the other case, either.

1 United States government's antitrust guidelines; a big,
2 thick law review article about antitrust. I don't know how
3 they're planning on using these things, but it seemed to
4 make sense to get some guidelines from you for the fact that
5 we're not going to be getting into these types of documents
6 or those types of arguments in this case.

7 THE COURT: I'm inclined to grant it in part.
8 How is the antitrust enforcement guidelines, antitrust
9 articles going to be relevant to this part of the case?

10 MR. STEINBERG: Your Honor, I think this is
11 fundamentally similar to the generative AI issue in that we
12 haven't been provided with a definition of what "antitrust"
13 means in this context, so while we don't intend to introduce
14 antitrust evidence, there's evidence about, say, market
15 position or about activities in the market that are
16 plausibly relevant to both, and we don't think a *per se* rule
17 of exclusion is appropriate. We think the appropriate
18 response is to deny this motion and then grant objections as
19 appropriate in the course of the trial.

20 THE COURT: I'm going to grant it in part. I
21 think I will allow you to put on evidence about their
22 marking control to the extent you can tie it to fair use.
23 Anything that is not tied to fair use or damages that's just
24 straight antitrust, market share, et cetera will be kept
25 out.

1 MR. STEINBERG: Understand, Your Honor. Thank
2 you.

3 MS. CENDALI: May I ask one clarification, Your
4 Honor?

5 THE COURT: Yes.

6 MS. CENDALI: This is something that came out in
7 the briefing that we alluded to. They said we think it
8 could be relevant to factor four in fair use. And as we
9 explain, that's confusion because they kept saying,
10 effectively, that we interpreted their brief as saying
11 Thomson Reuters is big so we can't hurt them. And
12 therefore, we can make those kinds of arguments, but that's
13 actually not what factor four is about.

14 As Campbell says, quoting section 1074 of the
15 Copyright Statute is the effect of the use on the potential
16 market or the value of the copyrighted work. It's not the
17 harm to the company, in that we mean every big company would
18 lose the case. It's the value of the copyrighted work which
19 is a fundamental issues because we don't want to have
20 sidebars, nor you, Your Honor, on saying, Your Honor, it
21 doesn't matter that we're big. That plays into the David
22 and Goliath. What matters is the effect of the market --

23 THE COURT: That is black letter copyright law.
24 Absolutely. So how much does this affect the value of
25 Westlaw, the going concern? Is it charging the subscribers,

1 is it undercutting its sales to people? Market share is
2 going to be part of it. If there's evidence that sales
3 dipped or didn't dip, et cetera, they may be able to draw
4 inferences about we were reaching new consumers rather than
5 old ones, and only to that extent can it be used.

6 MS. CENDALI: Also, Your Honor, it's fairly
7 important, certainly to us, and it's also black letter law
8 that the test is if the use becomes widespread, and there's
9 been in the literature and academics, professors write about
10 sometimes it's clear that it's not a damages analysis. In
11 other words, it's -- if everyone and his brother were doing
12 this, would that hurt? If everyone and his brother did what
13 they did, which is go to us, we want to replace Westlaw,
14 which is what they did, would that hurt us? That's what
15 this is about. We don't want to confuse the jury.

16 THE COURT: This is not, you know, 2 Live Crew
17 using another person's music where the people who are going
18 to buy country style Pretty Woman are different than the
19 people who are going to buy Parrot. This is selling to the
20 same market and the same people, so you've got a strong
21 position that this is going to undercut the value of your
22 copyright for that market. Absolutely.

23 That is the correct analysis, but I think that
24 there are ways, limited ways in which some of this goes to
25 do we see marginal effects that suggest that the work isn't

1 being undermined or not because AI in some ways might be
2 transformative, but that's where the battle is going to be.

3 MS. CENDALI: I'll just say, though, because I
4 believe -- I think the law is that you can't just encamp AI
5 and have it be a magical thing that is transformative. I
6 think the Copyright Act is really clear and the cases are
7 clear. It's very fact-intensive and you look at each case.

8 In a case like this, where someone has used your
9 own work to come up with a product that they marketed as a
10 substitute and a replacement for your work, is different
11 fundamentally from other types of cases like generative AI
12 cases where the results might be different and the amount of
13 competition might be different.

14 THE COURT: Ultimately, it's going to come down
15 to a battle of how the jury understands from the experts
16 different -- whether they play a different role with
17 consumers, is there a substitution effect here versus a
18 complimentary effect. There's a lot of stuff that's well
19 above my pay grade, which is partly why this is a jury
20 question. I absolutely get the argument.

21 MS. CENDALI: Thank you, Your Honor.

22 MR. PARKER: I want to put a fine point on it.
23 The reason we oppose the motion is just now you heard the
24 concept that they can't just say this company is big. "This
25 company is big" is not an antitrust concept. And that's

1 what we were concerned about, is the concepts that may apply
2 in antitrust will be precluded under the copyright because
3 they're concepts that are in antitrust.

4 THE COURT: If it relates to a
5 copyright-specific analysis, it comes in.

6 MR. PARKER: That's all I wanted to hear. Thank
7 you.

8 THE COURT: All right. Third motion in Limine.
9 Motion to exclude testimony referencing ROSS shutting down.
10 ROSS says it doesn't plan to mention the shut down, but if
11 Thomson Reuters argues it failed because its technology was
12 bad, it might be in rebuttal. That's a basic
13 opening-the-door analysis that if you don't open the door,
14 I'll grant the motion on that.

15 MS. MEANS: Yes, Your Honor. Miranda Means for
16 Plaintiff. I was going to say the parties are relatively
17 close on this. There's not much daylight Thomson Reuters
18 doesn't intend to offer testimony or evidence as to why,
19 specifically, ROSS shut down.

20 Now, I think where there was some disagreement
21 was how far does that extend. Does it extend to all
22 financials? Obviously, Thomson Reuters intends to put in
23 information about ROSS's financials. It's relevant to
24 damages. We're not going to go the step further and go down
25 the road of what happened after we filed this lawsuit. Did

1 ROSS specifically shut down for this reason, or did it shut
2 down for other reasons?

3 THE COURT: I'm curious if -- you've got to
4 figure out -- I guess the jury won't know or hear about it,
5 but it is a puzzling thing, Thomson Reuters, the stakes of
6 going after a failed competitor here. Perhaps you're trying
7 to deter other people out there, but that's absolutely --
8 the jury shouldn't be paying attention to this.

9 Now, we have three motions from ROSS. So
10 excluding mention of the market for AI training data, but
11 the plaintiffs weren't in the market and didn't express
12 interest in joining it. It does seem to me like existence
13 or cost of training AI data and the market for that, why
14 wouldn't that matter for damages calculations here?

15 Who from ROSS wants to speak to this.

16 MR. STEINBERG: I'll speak to it, Your Honor. I
17 think our point was more about fair -- specifically about
18 fair use analysis, where under factor four, what needs to be
19 compared is what ROSS was putting onto the market as opposed
20 to the Westlaw product that Thomson Reuters puts out. I
21 think if there's a way in which it's relevant for damages,
22 that would, in this case, need to be appropriate and
23 bifurcated because ROSS was never in the business of selling
24 trading data. ROSS didn't put out a product that relied on
25 selling trading data. It was not displace the market for

1 selling trading data, but I'm also not sure how it would be
2 relevant for damages given that ROSS was not in that
3 position.

4 MS. CHANG: Your Honor, with respect to the
5 question of fair use, the inquiry is not whether a defendant
6 has a competing product on the market. It's certainly not
7 limited to that. If we go back to the language of the
8 Copyright Statute itself, I'm referencing 17 U.S.C. Section
9 107, which lists factor four as the effect of the use upon
10 the potential market or the value of the copyrighted work.
11 So the appropriate inquiry here is whether there's a
12 potential market for AI training data. There's certainly
13 evidence of that on record. There's testimony from
14 witnesses from ROSS who say we don't want anyone else using
15 memos we purchased from Legalese to be able to use the AI
16 training data that we bought to create a competing legal
17 research platform.

18 The question here of damages, it's quite frankly
19 already been addressed by this Court. It was addressed in
20 the Daubert motions of Dr. Krine, Mr. Malikowski. And
21 specifically Mr. Malikowski offered the damages opinion on
22 behalf of Plaintiffs that because the plaintiffs were losing
23 the exclusive right to license the AI training data or enter
24 the market that there was harm to Plaintiffs. Dr. Krine
25 further opined that there is this market for potentially

1 licensing AI training data. He identified 17 companies.
2 Your Honor found that both of those opinions were admissible
3 and also denied the parties' cross-motions for summary
4 judgment.

5 THE COURT: I'm going to deny. I think
6 Malikowski and Krine are ones the jury is entitled to
7 consider.

8 Let's move on to the next motion, motion to
9 exclude the evidence or testimony about Charles Simpson. He
10 joined ROSS after the bulk memo project. As long as he's
11 testifying about the events he took part in after he joined,
12 this seems like it's quite relevant. I mean, it's fair
13 enough to not let him speculate about things that happened
14 beforehand or imply he knows about the whole course of
15 things, but what's the argument for keeping it out if he's
16 just going to talk about -- if we make it clear he joined
17 after the bulk memo and he's only testifying about things he
18 took part in?

19 MR. STEINBERG: To clarify, Your Honor, we do
20 not intend to call Charles Von Simpson. If I recall
21 correctly, he's not on the plaintiff's exhibit list either.
22 I think they were intending to introduce evidence related to
23 him.

24 We think there's two issues with testimony about
25 Charles Von Simpson. One, there is no relevance. He

1 certainly could testify to events that happened afterwards
2 if it were relevant to any copyright use, but, in fact, his
3 testimony is pretty clear. He may have accessed Westlaw to
4 benchmark a product. There's no copyright use. It's not
5 relevant to copyright use. In fact, Plaintiffs a brought in
6 a motion to amend their complaint to include Mr. Von Simpson
7 and withdrew that motion to amend.

8 We also think it's potentially confusing because
9 there are allegations of access to Westlaw but they come
10 after the bulk memo project, have nothing to do with
11 copyright infringement allegations, and simply are
12 temporally removed from anything that could be possible
13 copyright infringement. We don't see relevance. We do see
14 a potential for prejudice.

15 THE COURT: Okay.

16 MR. LOVERRO: Good afternoon, Your Honor. Eric
17 Loverro on behalf of Plaintiffs.

18 To address the first point about relevance,
19 Mr. Von Simpson is relevant because the evidence concerning
20 him establishes ROSS's institutional knowledge. It's
21 important for tortious interference specifically, that can
22 be proved through circumstantial evidence. And there's
23 something that's -- ROSS is kind of overlooking in the
24 evidence related to Mr. Von Simpson which is when Mr. Von
25 Simpson was accessing Westlaw and getting an agreement from

1 Westlaw in his own Gmail account, not using ROSS's account,
2 and talking to ROSS's executives about what is or not
3 permissible and ROSS's executives are responding to him, no
4 one is saying this is new information for the first time
5 that they're hearing. That is strong circumstantial
6 evidence that Plaintiffs should be entitled to pair with
7 other contemporaneous evidence both before the bulk memo and
8 during the bulk memo project was happening such that ROSS
9 was there at all times from the moment that Plaintiffs
10 denied it access in 2015 to when Mr. Von Simpson was
11 attempting to get access in 2018 and '19 that ROSS knew
12 about the terms of service of Westlaw and knew exactly what
13 Mr. Von Simpson would have to do to get access and knew that
14 it couldn't identify itself as a competitor. All of that is
15 related to Defendant's tortious interference.

16 THE COURT: I'm going deny the motion in limine.
17 I'm going to allow evidence of testimony of Charles Von
18 Simpson. I'm going to allow for the purposes that Plaintiff
19 set out if it goes to tortious interference and goes to the
20 awareness and the like but, again, it's not --

21 MR. STEINBERG: Can I make one more point on
22 this?

23 THE COURT: Yes.

24 MR. STEINBERG: The tortious interference
25 allegations have been limited now to password sharing and

1 the use of a bot to scrape data. There's no allegation that
2 Charles Von Simpson knew anything about that or had anything
3 to do with it. We're not sure how they could acknowledge of
4 how the activities were unlawful tortiously interfering or
5 anything like that, given that it's not anything to do with
6 anything Charles Von Simpson ever did.

7 THE COURT: How would you connect it up?

8 MR. LOVERRO: Two points, Your Honor, and I will
9 go slowly this time. Sorry about that.

10 The first is that evidence related to Mr. Von
11 Simpson is also relevant to secondary liability, but there
12 are also documents, evidence where Mr. Von Simpson is
13 discussing both whether ROSS is able to scrape Westlaw's
14 content and the content -- this is in context of some
15 project that they were doing deciding whether they would be
16 able to scrape websites that were hosted by Westlaw, and
17 also whether they could password share because, as ROSS is
18 well aware, Mr. Von Simpson got access to Westlaw and was
19 sharing the password credentials all throughout ROSS. He
20 acknowledges -- this is also in his deposition
21 testimony where he acknowledges that's a violation of the
22 terms of service and he was telling other people at ROSS
23 that much as well. Again, this all plays back to what I was
24 talking about before as well as tortious interference as
25 well as secondary liability and the other issues numerated

1 in our response.

2 THE COURT: I'll deny the motion.

3 All right. The last motion I had down is some
4 of the Krine's -- he didn't disclose in his expert report.
5 I let Barbara Frederickson's evidence in even though I
6 assume it was untimely. I think what's good for the goose
7 is good for the gander. Krine hadn't had a chance to opine
8 on this because Barbara Frederickson-Cross, that her --
9 didn't have a chance to speak to it before. Seems like I
10 should be evenhanded in letting both sides speak to this.

11 MR. STEINBERG: Your Honor, I think the key
12 difference is Dr. Krine had Ms. Frederickson-Cross's report.
13 He refused to read it. He refused to answer questions about
14 it at his deposition. They can't now introduce opinions he
15 might have given, depriving us any chance to challenge the
16 opinions when they had full access to the report and the
17 opportunity to read it.

18 THE COURT: Is that how we got here?

19 MR. SIMMONS: So, Your Honor, the timeline of
20 events was that there's a scheduling order in this case that
21 permitted opening and rebuttal reports. Barbara
22 Frederickson-Cross and Jonathan Krine both provided opening
23 and rebuttal reports. After those deadlines, Barbara
24 Frederickson-Cross produced a supplemental report she calls
25 a surrebuttal and acknowledged contained new opinions that

1 had never been put in the two reports that were permitted
2 under the scheduling order.

3 As Your Honor's Daubert opinion recognizes, that
4 was untimely. The Court has already ruled she's allowed to
5 put those opinions in for the reasons provided in the
6 Daubert. We agree, however, that Jonathan Krine should be
7 permitted to respond them. The lateness of her report
8 prejudiced our ability to prepare and his ability to review
9 a voluminous report in preparation for his deposition.

10 Two, the fairness issue is they're going to get
11 to put in this evidence. He certainly should be allowed to
12 respond to her new theories that she only put in in terms of
13 surrebuttal. In terms of prejudice, we would be willing to
14 prepare a short supplemental report if they want to have
15 disclosure of the new opinions in advance of trial, just so
16 we're all playing from the same bucket.

17 THE COURT: I think I'll allow both but given
18 the report and --

19 MR. PARKER: Then we would request a deposition.
20 We were deprived of it. We literally don't know what he's
21 going to say or what he was given.

22 The order is Ms. Cross did not receive the
23 disclosure of the head notes at issue until after her first
24 opinion. That's what drove all of this. What drove all of
25 this is the plaintiffs, after the Court ordered the

1 disclosure, the plaintiffs did and issued an opinion related
2 to that. There's absolutely no question that Dr. Krine in
3 deposition was asked whether he read Barbara
4 Frederickson-Cross's report, and he said no. It was not one
5 of those issues where it was given to him the day before.

6 And so we have never been able to ask him any
7 questions. We've never even begun to say there's something
8 else out there until these motions in limine. So I
9 understand they had an opportunity, full and fair, to
10 question Barbara Frederickson-Cross. We have not. Now
11 they're coming up with they want to rebut something that
12 they had every opportunity to rebut and didn't.

13 And finally, and the reason it's very important
14 to us --

15 THE COURT: They want to rebut her belated
16 surrebuttal.

17 MR. PARKER: I push back on the late. That's
18 fine. I'm not going to fight that with the Court.

19 That's what -- now we're having this knock-on
20 effect because the issues in that report, we should be able
21 to ask him questions about it. They definitely had the full
22 opportunity, however late that cross report was.

23 MR. SIMMONS: Your Honor, two points on that.

24 Number one, Dr. Frederickson-Cross's surrebuttal
25 was not the subject of her deposition, as her Daubert order

1 acknowledged. From our perspective it was untimely, not
2 permitted by the scheduling order, she wasn't asked
3 questions about it. I think both experts filled in that
4 with deposition.

5 Fundamentally, an expert report is intended to
6 be the disclosure of opinions. The way the federal rules
7 are designed, this is more information than you normally
8 would get at trial. The expert report will tell you exactly
9 what he's going to say. As Your Honor acknowledged, he
10 should be able to respond. I'm offering to give them more
11 than they otherwise would get.

12 THE COURT: Yeah, I think this gives enough, and
13 I think it's important that the jury hear more rather than
14 less. I realize this is one of these no-win situations.
15 Whichever ruling I make, someone is going to feel aggrieved.
16 I think the best thing for the jury is to hear both sides
17 and if the defendants feel like they've been aggrieved and
18 there's something surprising, which I don't think should be
19 the case by the nature of the surrebuttal, if some kind of
20 continuance or recalling the witness later is necessary, I'm
21 amenable to some flexibility on how we handle this witness
22 on the stand, but I'm going to allow it.

23 MR. SIMMONS: Thank you, Your Honor.

24 THE COURT: All right. We have long lists of
25 deposition designations and trial exhibits. Now, you've

1 already talked to me about how you're going to deal with
2 trial exhibit lists and objections. In terms of the
3 deposition designations, does any of this need to be
4 resolved by the Court? You already mentioned you're working
5 toward resolution together. I see Mr. Parker shaking his
6 head.

7 Ms. Chang, what would you like to say?

8 MS. CHANG: I think that Mr. Parker and I may be
9 agreement, which is that there's nothing for the Court to
10 address at this time. The parties, again, spoke about the
11 deposition designations at the same time as the exhibits.
12 We certainly plan to cull down the deposition designations.
13 We're mindful of the time. We don't intent to play all of
14 this.

15 THE COURT: Let me make a couple of suggestions.

16 First of all, you all know that the best way to
17 get through a case like this is to put on the video deps of
18 the uncontested stuff.

19 Second, you clip them down.

20 Third, you come in with a sense how long they
21 are and then we can play them when we have a block of time
22 at the end of the afternoon.

23 Fourth, I find playing these things at one time
24 speed is extremely boring for everyone involved. I would
25 ask you to consider either 1.25 or 1.5 times depending on

1 how fast they were, but you want to have some list of how
2 long it takes and the speed you're going to play them at.
3 Maybe it's the generation. I'm certainly listening to all
4 my podcasts at one and a half speed now. Perhaps some older
5 jurors wouldn't be used to that, but I trust that you're
6 going to work this out.

7 I ask you to come into court with a sense --
8 I'll defer to however the parties want to put this on, the
9 speed, what it needs to be clipped. I ask that you be
10 mindful and ask the paralegals in the next couple of weeks
11 to come in with lists at the speed you end intend to play
12 it, how long each of them will wind up taking so if you have
13 25 minutes until, say, breaking for the day at 4:30 we can
14 think about which of these pieces we can slot in to best use
15 that time.

16 MS. CHANG: We'll certainly do that, Your Honor
17 if I may make one suggestion, once we have the designations
18 and we have the testimony and it's in writing, may I suggest
19 that the parties jointly submit that transcript to the Court
20 to be included in the trial record so that the deposition
21 testimony need not be transcribed while played live here in
22 court.

23 THE COURT: That makes perfect sense. The
24 grateful court reporter thanks you.

25 Let's talk about filtration. I am going deny

1 filtration for a couple of reasons.

2 The first one is I think Ms. Cendali argues with
3 some force, but they have a live argument, that this is not
4 just about the individual pieces but a system or
5 arrangement.

6 Second of all, even if I were inclined to filter
7 things out, from an analogy, it seems a fair fact to settle
8 on. What ROSS has given us, there are -- there may be some
9 there are verbatim but there are many that are just altered
10 just enough that a reasonable jury could find that there was
11 some creativity in the individual way that a question was
12 turned into a statement or introductory words were changed
13 or very often something was omitted but there are points of
14 ellipsis. So I don't know if I was a juror I would find
15 personally that involved creativity, but I think a
16 reasonable juror on so many of the things that were proposed
17 could potentially find it.

18 Both because of that reason and because of
19 Ms. Cendali's argument, I'm going to send it all to the jury
20 unless something in my understanding of arguments in the
21 copyright law changes, and the parties have work to do here
22 to talk about what their proposals are about how you're
23 going to present this massive number of head notes to the
24 jury.

25 Do you have a suggestion about when you want to

1 come back to me about that with further detail?

2 MS. CENDALI: Not at this time, Your Honor.

3 THE COURT: Okay. We have a couple more weeks.

4 Antitrust counterclaims. Just a reminder, on
5 September 18th from 3:00 to 4:00 p.m. I'm scheduled for oral
6 argument by Zoom for the summary judgment motion on -- this
7 is ROSS's antitrust counterclaims and on Thomson Reuters's
8 motions in limine about ROSS's experts on antitrust
9 counterclaims. I think Thomson Reuters originally also
10 asked to make an oral argument on some associated motions in
11 limine.

12 But, ROSS, is there any real need for oral
13 argument on this motion in limine against Chad Seiberson's
14 motions and opinions? I don't know who's handling that on
15 the antitrust piece of this case.

16 MR. SIMMONS: Your Honor, and also on the
17 Thomson Reuters side, our antitrust attorneys didn't come to
18 the preference because our understanding is it was not this
19 case.

20 THE COURT: We'll raise this again later. It's
21 a different team that's doing that.

22 MR. SIMMONS: Yes, Your Honor.

23 THE COURT: Got it.

24 MR. SIMMONS: As much as we'd like to come and
25 argue with you on the antitrust issues as well, we have

1 antitrust lawyers coming to do that.

2 MS. CENDALI: We're pretty confident our
3 antitrust lawyers would not like us to argue.

4 THE COURT: I want to thank the parties for the
5 professional and efficient way you managed to keep this
6 moving ahead. I'm grateful that we've got agreement on a
7 number of things. We're working towards agreement on the
8 rest. I will await Mr. Parker's update about is it
9 Dr. Marks, not Dr. Morris, and hopefully we'll learn some
10 more and hoping for some good news later this week.

11 MR. PARKER: Understood. Thank you.

12 THE COURT: Wonderful. This Court stands
13 adjourned.

14

15 C E R T I F I C A T E

16 I, Deanna L. Warner, a Registered Professional
17 Reporter, do hereby certify that as such Registered
18 Professional Reporter, I was present at and reported in
19 Stenotype shorthand the above and foregoing proceedings.

20 

21 _____
22 Deanna L. Warner, RPR, CSR
23 Official Court Reporter
24 U.S. District Court
25

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